Ibrahim bin Hashim v Devi Mulya Tristiati & Anor

HIGH COURT (PENANG) — CIVIL APPEAL NO PA-22NCVC-186–09 OF 2017
KENNETH ST JAMES JC
3 JULY 2023

Contract — Marriage — Breach of promise — Allegation of breach of promises made after marriage — Allegation of existence of marital conditions — Whether it was inherently probable that wife made such marital promises — Whether it was inherently probable that husband placed marital conditions on marriage and wife agreed with such conditions — Whether wife breached marital promises — Whether there was contract between husband and wife

Contract — Transfer of land — Undue influence — Manipulation — Coercion — Domination — Husband transferred house to wife — Whether wife used undue influence, manipulated, coerced or dominated husband to transfer house to wife — Contracts Act 1950 ss 15 & 16

Land Law — Indefeasibility of title and interests — Charge — Whether bank was chargee of good faith for valuable consideration — Whether bank acquired indefeasible interests in house — National Land Code ss 5 & 340(3)

Tort — Conversion — Detinue — Whether tort of conversion and detinue applicable to real property — Whether conversion and detinue established

Tort — Nuisance — Unlawful interference with trade — Allegation of unlawful interference on land — Whether tort of unlawful interference on land existed under common law — Whether elements of tort of unlawful interference with trade fulfilled

Tort — Trespass to land — Elements of trespass to property — Whether elements of trespass to property satisfied

The plaintiff and the first defendant were married on 20 September 2000 and five years after the marriage, the plaintiff had transferred a house located in Bayan Lepas, Penang ('the house') to the first defendant. The house was initially charged to HSBC Bank Malaysia Bhd ('HSBC Bank') to procure a loan for the plaintiff but thereafter, on the application by the first defendant,

the house was refinanced by Citibank ('the second defendant'). In the present case, the plaintiff alleged that the first defendant had made promises to him during the marriage that she would remain as his wife and take care of him permanently until his demise, she would not leave him, and she would continue to give him her undivided love (collectively referred to as 'the marital promises'). The plaintiff had also asserted that he had placed conditions on the marriage that if the first defendant breached the marital promises, then: (a) the plaintiff would be entitled to divorce the first defendant; (b) the first defendant would not be entitled to claim maintenance from the plaintiff; (c) the first defendant would not be entitled to claim any property or division of property from the marriage; and (d) the plaintiff would be entitled to claim and recover any property which he had transferred to the first defendant (collectively referred to as 'the marital conditions'). As the first defendant had breached these promises, the plaintiff had brought the present action against the first defendant (now ex-wife) and Citibank for various declarations and for damages. The plaintiff's pleaded causes of action against both defendants were premised on conversion, detinue, trespass to property, and unlawful interference with property. In addition, the plaintiff had also sued the first defendant under the causes of action of undue influence, manipulation, coercion, and domination. The issues arose in the present case were: (i) whether the first defendant breached the marital promises; (ii) whether the first defendant used undue influence, manipulated, coerced or dominated the plaintiff to transfer the house to the first defendant; (iii) whether the defendants committed conversion, detinue, trespass to property and unlawful interference against the plaintiff; and (iv) whether Citibank was the 'subsequent purchaser' of the house and had therefore acquired an indefeasible interest in the house under sub-s 340(3) of the National Land Code ('the NLC'), notwithstanding the alleged undue influence, manipulation, coercion or domination by the first defendant on the plaintiff in relation to the house.

Held, dismissing the plaintiff's claim against the first and second defendants with costs of RM50,000 to be paid by the plaintiff to each of the defendants subject to allocatur:

(1) The plaintiff had the burden of proving, on the balance of probabilities, that the first defendant had made the marital promises and that the plaintiff had placed the marital conditions on their marriage and the first defendant agreed to be bound by them. However, in the present case, the plaintiff had not submitted, to either guide the court or bind the court, any statute law or any case law authorities that the marital promises and the marital conditions were enforceable. Instead, the first defendant denied making the promises and further denied the existence of such marital conditions. As there was diametrically conflicting evidence, the court ought to: (a) consider which version was 'inherently probable or improbable'; and (b) consider the overall probabilities and take into

account all surrounding circumstances to decide on the truth of an asserted fact. In a situation where there was conflicting evidence, the court's primary evaluation was whose version was more inherently probable, and not merely who was more credible (see paras 70–79, 81 & 83).

(2) The court was of the view that it was inherently improbable that the first defendant made those marital promises, or that the plaintiff placed those marital conditions on their marriage and the first defendant agreed to them. This was because, based on the evidence, it was likely that the marriage was not a love marriage considering that the first defendant married the plaintiff through the involvement of the first defendant's godfather. Further, if the first defendant had agreed to the marital conditions, it would have been a substantial, if not complete, waiver of her rights as a wife. The court, therefore, on the balance of probabilities, found that it was more likely than not that the first defendant did not make the marital promises. Similarly, the court found that if the plaintiff had placed the marital conditions on the marriage, it was not likely that the first defendant would have agreed to those marital conditions (see paras 86–88).

(3) The court found that there was, in fact, no contract formed between the plaintiff and the first defendant. The plaintiff had not proven all the elements of a contract. He had not proven that there was an offer from him (containing the marital promises and the marital conditions that he asserted). He had not proven that the first defendant accepted his offer and he had not proven that there was a mutual intention to enter such a contract, particularly on the part of the first defendant (see para 90).

(4) With respect to undue influence, the court found that the presumptions in sub-s 16(2) of the Contracts Act 1950 ('the CA') did not apply in the present case. The plaintiff had not presented or produced, and the court did not find, that: (a) the first defendant held 'a real or apparent authority' over the plaintiff or that she was the plaintiff's fiduciary; and (b) there was contract between the first defendant and the plaintiff, such that the plaintiff's 'mental capacity' was in question due to his age or illness or distress. Further, there was no cogent evidence that: (i) the first defendant dominated the plaintiff's will; (ii) the first defendant in a dominant position to influence the plaintiff; and (iii) the first defendant had an unfair advantage over the plaintiff. The court therefore found, on the balance of probabilities, that the plaintiff had not proved that the first defendant committed undue influence upon him, which caused the plaintiff to transfer the house to the first defendant (see paras 93, 97 & 107).

(5) To manipulate someone was to influence or control someone, usually into doing something. To dominate someone was to have power or

control over someone; to be able to direct or command someone; to rule over someone. There was no cogent evidence that the first defendant manipulated or dominated the plaintiff into transferring the house to the first defendant. On the contrary, the agreed undisputed facts, which were supported by the contemporaneous documents, demonstrated that the transfer of the house to the first defendant and the refinancing of the house were not tainted by the alleged manipulation and that these acts were done willingly. The court therefore found, on the balance of probabilities, that the plaintiff had not proved that the first defendant manipulated and dominated the plaintiff into transferring the house to the first defendant (see paras 108–114).

(6) Coercion was defined under s 15 of the CA. The elements of coercion under the said provision were: (a) doing or threatening to do an act that was prohibited by the Penal Code; and (b) unlawfully detaining, or threatening to detain, a property to someone's prejudice. In the present case, there was no evidence of a threat to perform a criminal act and there was no evidence of the first defendant unlawfully 'detaining' the house to the plaintiff's prejudice. There was no cogent evidence that the first defendant coerced the plaintiff into transferring the house to the first defendant. The court therefore found, on the balance of probabilities, that the plaintiff had not proved that the first defendant coerced the plaintiff into transferring the house to the first defendant (see paras 115–119).

(7) Conversion was when someone took goods or chattels belonging to someone else and dealt with them as if the goods or chattels were her own. Based on the case law and other authorities, the court was of the view that conversion did not apply to real property, namely, the house and was only applicable to goods and chattels. In any event, the contemporaneous documentary evidence proved that the house was transferred by the plaintiff to the first defendant in August 2005, the plaintiff had withdrawn his private caveat over the house, and the first defendant as the owner had charged the house to Citibank in May 2014. Section 89 of the NLC stated that the register document of titles was conclusive evidence that the first defendant owned the house (see paras 120, 122 & 128–129).

(8) The court found that the plaintiff had produced, not only insufficient evidence, but no evidence to prove the elements of conversion. There was no evidence to prove that the first defendant's conduct was inconsistent with the plaintiff's rights over the house and that the first defendant and Citibank misappropriated the house from the plaintiff. The plaintiff had signed all the legal instruments necessary to transfer the ownership of the house to the first defendant in the year 2005. Further, there was no evidence that the first defendant and Citibank encroached onto the

plaintiff's rights as the owner of the house. In this regard, the plaintiff had already divested his rights over the house to the first defendant many years before the dispute arose between them. The plaintiff had therefore failed to prove the elements required to succeed in his cause for conversion (see paras 133–136).

(9) Detinue was the tort where someone wrongfully detained someone else's goods or chattels. The court was of the view that detinue did not apply to real property, ie, the house. In any event, there was no evidence to demonstrate that the first defendant had wrongfully detained the house from the plaintiff. The court found that the plaintiff's causes for conversion and detinue were plainly misaligned with the facts of the case. The first defendant in the present case did not deal with a piece of land that did not belong to her (see paras 137, 139 & 141–142).

(10) There was no cogent evidence that the first defendant entered the house, remained in the house and placed objects on or in the house when she had no right to. She was the rightful owner of the house at the material times. Further, the plaintiff had also conceded during trial that there was no trespass to property committed against him. Therefore, the court found, on the balance of probabilities, that the plaintiff had not proved that the first defendant or Citibank trespassed onto the house (see paras 144 & 146–148).

(11) The plaintiff had not satisfied the elements of the cause of action of unlawful interference with trade or business because: (a) the plaintiff did not plead the material facts that satisfy these elements; (b) this cause of action was incongruous with the facts of this case whereby no trade or business was said to have been unlawfully interfered with; (c) the plaintiff did not plead the tort of nuisance which was different to the tort of unlawful interference with trade or business; (d) the plaintiff did not submit case law authority that under the common law, there was such a cause of action of 'unlawful interference on land'; and (e) the plaintiff had not proffered evidence that: (i) the first and second defendants interfered with the plaintiff's rights over the house; (ii) the first and second defendants used unlawful means; (iii) the first and second defendants had intention to injure the plaintiff; and (iv) that the plaintiff was actually injured. Based on the above findings, the court concluded that the plaintiff's cause of action for 'unlawful interference on land' was misconceived and misplaced (see paras 151–156 & 160).

(12) Citibank, as chargee, was a 'purchaser' within the definition of 'purchaser' under s 5 of the NLC, since Citibank acquired an interest in the house. In the present case, there was no evidence that dispelled the fact that Citibank procured the charge in good faith and for valuable consideration. In the present case, in addition to admitting that Citibank did not commit detinue, trespass to property and unlawful interference

concerning the house, the plaintiff had also admitted in cross-examination that: (a) Citibank was not privy to any agreement or dispute between the plaintiff and the first defendant; and (b) the outstanding amount due under the first defendant's loan must first be paid up (so that the charge could be discharged) before any further transfer of the house could take place. The court had also considered the plaintiff's testimony against the contemporaneous documents such as the title search, the notice of withdrawal of private caveat (Form 19G), and the charge (Form 16A). The case law authorities guided the court and bound the court to prefer the contemporaneous documents over the plaintiff's oral testimony. Based on the above findings, the court ruled that Citibank was a purchaser (chargee) of good faith and for valuable consideration of the house and had consequently acquired an indefeasible interest in the house pursuant to s 340(3) of the NLC (see paras 167, 169, 171 & 175–178).

[Bahasa Malaysia summary

Plaintif dan defendan pertama telah berkahwin pada 20 September 2000 dan lima tahun selepas perkahwinan tersebut, plaintif telah memindahkan sebuah rumah yang terletak di Bayan Lepas, Pulau Pinang ('rumah tersebut') kepada defendan pertama. Rumah tersebut pada mulanya dicagarkan kepada HSBC Bank Malaysia Bhd ('HSBC Bank') untuk mendapatkan pinjaman untuk plaintif tetapi selepas itu, atas permohonan oleh defendan pertama, rumah tersebut telah dibiayai semula oleh Citibank ('defendan kedua'). Dalam kes ini, plaintif mendakwa bahawa defendan pertama telah berjanji kepadanya semasa perkahwinan bahawa dia akan kekal sebagai isterinya dan menjaganya secara kekal sehingga kematiannya, dia tidak akan meninggalkannya, dan dia akan terus memberikannya cinta yang tidak berbelah bahagi (secara kolektif dirujuk sebagai 'janji perkahwinan'). Plaintif juga telah menegaskan bahawa dia telah meletakkan syarat ke atas perkahwinan tersebut bahawa jika defendan pertama memungkiri janji perkahwinan tersebut, maka: (a) plaintif berhak untuk menceraikan defendan pertama; (b) defendan pertama tidak akan berhak menuntut nafkah daripada plaintif; (c) defendan pertama tidak berhak menuntut apa-apa harta atau pembahagian harta daripada perkahwinan tersebut; dan (d) plaintif berhak menuntut dan mendapatkan semula apa-apa harta yang telah dia pindahkan kepada defendan pertama (secara kolektif dirujuk sebagai 'syarat perkahwinan'). Oleh kerana defendan pertama telah memungkiri janji-janji ini, plaintif telah membawa tindakan semasa terhadap defendan pertama (kini bekas isteri) dan Citibank untuk pelbagai pengisytiharan dan untuk ganti rugi. Kausa-kausa tindakan plaintif terhadap kedua-dua defendan adalah berdasarkan konversi, detinu, pencerobohan harta, dan campur tangan yang tak sah terhadap harta. Di samping itu, plaintif juga telah menyaman defendan pertama di bawah kausa-kausa tindakan pengaruh tak berpatutan, manipulasi, paksaan, dan penguasaan. Isu-isu yang timbul dalam kes ini ialah: (i) sama ada defendan pertama memungkiri janji

perkahwinan; (ii) sama ada defendan pertama menggunakan pengaruh tak berpatutan, memanipulasi, memaksa atau menguasai plaintif untuk memindahkan rumah tersebut kepada defendan pertama; (iii) sama ada defendan-defendan melakukan konversi, detinu, pencerobohan harta dan campur tangan tak sah terhadap plaintif; dan (iv) sama ada Citibank ialah 'pembeli berikutnya' bagi rumah tersebut dan oleh itu telah memperoleh kepentingan yang tidak boleh disangkal ke atas rumah tersebut di bawah sub-s 340(3) Kanun Tanah Negara ('KTN'), walaupun terdapat pengaruh tak berpatutan, manipulasi, paksaan atau penguasaan oleh defendan pertama ke atas plaintif berhubung dengan rumah tersebut.

Diputuskan, menolak tuntutan plaintif terhadap defendan pertama dan kedua dengan kos sebanyak RM50,000 yang perlu dibayar oleh plaintiff kepada setiap defendan tertakluk kepada alokatur:

(1) Plaintif mempunyai beban untuk membuktikan, di atas imbangan kebarangkalian, bahawa defendan pertama telah membuat janji perkahwinan tersebut dan bahawa plaintif telah meletakkan syarat perkahwinan pada perkahwinan mereka dan defendan pertama bersetuju untuk terikat dengannya. Walau bagaimanapun, dalam kes ini, plaintif tidak mengemukakan, sama ada untuk membimbing mahkamah atau mengikat mahkamah, mana-mana undang-undang statut atau mana-mana otoriti undang-undang kes yang memperuntukkan bahawa janji perkahwinan tersebut dan syarat perkahwinan tersebut boleh dikuatkuasakan. Sebaliknya, defendan pertama menafikan membuat janji tersebut dan seterusnya menafikan wujudnya syarat perkahwinan tersebut. Oleh kerana terdapat keterangan yang bercanggah secara diametrik, mahkamah harus: (a) mempertimbangkan versi mana yang 'sememangnya berkemungkinan atau tidak mungkin'; dan (b) mempertimbangkan keseluruhan kebarangkalian dan mengambil kira semua keadaan sekeliling untuk memutuskan kebenaran sesuatu fakta yang ditegaskan. Dalam keadaan di mana terdapat keterangan yang bercanggah, penilaian utama mahkamah adalah versi mana yang lebih berkemungkinan, dan bukan semata-mata siapa yang lebih boleh dipercayai (lihat perenggan 70–79, 81 & 83).

(2) Mahkamah berpandangan bahawa secara semula jadinya tidak mungkin defendan pertama membuat janji perkahwinan tersebut, atau plaintif meletakkan syarat perkahwinan tersebut pada perkahwinan mereka dan defendan pertama bersetuju dengannya. Ini kerana, berdasarkan keterangan, adalah berkemungkinan perkahwinan tersebut bukanlah perkahwinan berdasarkan cinta memandangkan defendan pertama berkahwin dengan plaintif melalui penglibatan bapa angkat defendan pertama. Selanjutnya, jika defendan pertama telah bersetuju dengan syarat perkahwinan tersebut, ia akan menjadi penepian yang besar, jika tidak pun penepian muktamad, haknya sebagai seorang isteri. Oleh itu,

di atas imbangan kebarangkalian, mahkamah mendapati adalah lebih berkemungkinan bahawa defendan pertama tidak membuat janji perkahwinan tersebut. Begitu juga, mahkamah mendapati bahawa jika plaintif telah meletakkan syarat perkahwinan tersebut pada perkahwinan tersebut, tidak mungkin defendan pertama akan bersetuju dengan syarat perkahwinan tersebut (lihat perenggan 86–88).

(3) Mahkamah mendapati bahawa sebenarnya, tiada kontrak yang dibuat antara plaintif dan defendan pertama. Plaintif tidak membuktikan semua elemen kontrak. Dia tidak membuktikan bahawa ada tawaran daripadanya (yang mengandungi janji perkahwinan dan syarat perkahwinan yang ditegaskannya). Dia tidak membuktikan bahawa defendan pertama menerima tawarannya dan dia tidak membuktikan bahawa terdapat niat bersama untuk memasuki kontrak sedemikian, terutamanya di pihak defendan pertama (lihat perenggan 90).

(4) Berkenaan dengan pengaruh tak berpatutan, mahkamah mendapati bahawa anggapan dalam sub-s 16(2) Akta Kontrak 1950 ('AK') tidak terpakai dalam kes ini. Plaintif tidak mengutarakan atau mengemukakan, dan mahkamah tidak mendapati, bahawa: (a) defendan pertama memegang 'kuasa benar atau zahir' ke atas plaintif atau bahawa dia mempunyai perkaitan amanah dengan plaintif; dan (b) terdapat kontrak antara defendan pertama dan plaintif, di mana 'keupayaan akal' plaintif dipersoalkan disebabkan oleh usia atau penyakit atau penderitaannya. Selanjutnya, tiada keterangan kukuh bahawa: (i) defendan pertama menguasai kemahuan plaintif; (ii) defendan pertama dalam kedudukan dominan untuk mempengaruhi plaintif; dan (iii) defendan pertama mempunyai kelebihan yang tidak adil terhadap plaintif. Oleh itu mahkamah mendapati, di atas imbangan kebarangkalian, bahawa plaintif gagal membuktikan bahawa defendan pertama melakukan pengaruh tak berpatutan ke atasnya, yang menyebabkan plaintif memindahkan rumah tersebut kepada defendan pertama (lihat perenggan 93, 97 & 107).

(5) Untuk memanipulasi seseorang adalah untuk mempengaruhi atau mengawal seseorang, biasanya untuk melakukan sesuatu. Untuk menguasai seseorang adalah untuk mempunyai kuasa atau kawalan ke atas seseorang; untuk dapat mengarahkan atau memerintah seseorang; untuk mentadbir seseorang. Tiada keterangan kukuh bahawa defendan pertama memanipulasi atau menguasai plaintif untuk memindahkan rumah tersebut kepada defendan pertama. Sebaliknya, fakta tidak dipertikaikan yang dipersetujui, yang disokong oleh dokumen kontemporari, menunjukkan bahawa pemindahan rumah tersebut kepada defendan pertama dan pembiayaan semula rumah tersebut tidak dicemari oleh manipulasi yang dikatakan dan bahawa perbuatan ini dilakukan secara rela. Oleh itu mahkamah mendapati, di atas imbangan

kebarangkalian, bahawa plaintif gagal membuktikan bahawa defendan pertama memanipulasi dan menguasai plaintif untuk memindahkan rumah tersebut kepada defendan pertama (lihat perenggan 108–114).

(6) Paksaan ditakrifkan di bawah s 15 AK. Elemen-elemen paksaan di bawah peruntukan tersebut ialah: (a) melakukan atau mengancam untuk melakukan sesuatu perbuatan yang dilarang oleh Kanun Keseksaan; dan (b) menahan secara tidak sah, atau mengancam untuk menahan, harta sehingga memudaratkan seseorang. Dalam kes ini, tiada keterangan ancaman untuk melakukan perbuatan jenayah dan tiada keterangan defendan pertama secara tidak sah 'menahan' rumah tersebut sehingga memudaratkan plaintif. Tiada keterangan kukuh bahawa defendan pertama memaksa plaintif untuk memindahkan rumah tersebut kepada defendan pertama. Oleh itu mahkamah mendapati, di atas imbangan kebarangkalian, bahawa plaintif gagal membuktikan bahawa defendan pertama memaksa plaintif untuk memindahkan rumah tersebut kepada defendan pertama (lihat perenggan 115–119).

(7) Konversi ialah apabila seseorang mengambil barang atau benda-benda peribadi milik orang lain dan berurusan dengannya seolah-olah barang atau benda-benda peribadi tersebut adalah miliknya. Berdasarkan undang-undang kes dan otoriti lain, mahkamah berpendapat bahawa konversi tidak terpakai kepada harta tanah, iaitu rumah tersebut dan hanya terpakai kepada barang dan benda-benda peribadi. Walau apa pun, keterangan dokumentari kontemporari membuktikan bahawa rumah tersebut telah dipindahkan oleh plaintif kepada defendan pertama pada Ogos 2005, plaintif telah menarik balik kaveat persendiriannya ke atas rumah tersebut, dan defendan pertama sebagai pemilik telah mencagarkan rumah tersebut kepada Citibank pada Mei 2014. Seksyen 89 KTN menyatakan bahawa dokumen daftar hakmilik adalah keterangan muktamad bahawa defendan pertama memiliki rumah tersebut (lihat perenggan 120, 122 & 128–129).

(8) Mahkamah mendapati bahawa plaintif telah mengemukakan, bukan sahaja keterangan yang tidak mencukupi, tetapi tiada keterangan untuk membuktikan elemen-elemen konversi. Tiada keterangan untuk membuktikan bahawa kelakuan defendan pertama adalah tidak konsisten dengan hak plaintif ke atas rumah tersebut dan bahawa defendan pertama dan Citibank menyalahgunakan rumah tersebut daripada plaintif. Plaintif telah menandatangani semua instrumen undang-undang yang diperlukan untuk memindahkan pemilikan rumah tersebut kepada defendan pertama pada tahun 2005. Selanjutnya, tiada keterangan bahawa defendan pertama dan Citibank menceroboh hak plaintif sebagai pemilik rumah. Dalam hal ini, plaintif telah pun melepaskan haknya ke atas rumah tersebut kepada defendan pertama bertahun-tahun sebelum pertikaian timbul antara mereka. Oleh itu,

plaintif telah gagal membuktikan elemen-elemen yang diperlukan untuk membuktikan kausanya berkenaan konversi (lihat perenggan 133–136).

(9) Detinu ialah tort di mana seseorang secara salah menahan barang atau benda-benda peribadi milik orang lain. Mahkamah berpendapat bahawa detinu tidak terpakai kepada harta tanah, iaitu rumah tersebut. Walau apa pun, tiada keterangan untuk menunjukkan bahawa defendan pertama telah menahan rumah tersebut secara salah daripada plaintif. Mahkamah mendapati bahawa kausa-kausa plaintif untuk konversi dan detinu adalah jelas bersalahan dengan fakta kes. Defendan pertama dalam kes ini tidak berurusan dengan sebidang tanah yang bukan miliknya (lihat perenggan 137, 139 & 141–142).

(10) Tiada keterangan kukuh bahawa defendan pertama memasuki rumah tersebut, kekal di dalam rumah tersebut dan meletakkan objek di atas atau di dalam rumah tersebut apabila dia tidak mempunyai hak untuk melakukannya. Dia adalah pemilik sah rumah tersebut pada masa material. Selanjutnya, plaintif juga telah mengakui semasa perbicaraan bahawa tidak ada pencerobohan terhadap harta yang dilakukan terhadapnya. Oleh itu, mahkamah mendapati, di atas imbangan kebarangkalian, bahawa plaintif gagal membuktikan bahawa defendan pertama atau Citibank menceroboh rumah tersebut (lihat perenggan 144 & 146–148).

(11) Plaintif gagal memenuhi elemen-elemen kausa tindakan campur tangan tak sah terhadap dagangan atau perniagaan kerana: (a) plaintif tidak memplid fakta-fakta material yang memenuhi elemen-elemen ini; (b) kausa tindakan ini tidak selari dengan fakta kes ini di mana tiada perdagangan atau perniagaan dikatakan telah diganggu gugat secara tidak sah; (c) plaintif tidak memplid tort kacau ganggu yang berbeza dengan tort campur tangan tak sah terhadap dagangan atau perniagaan; (d) plaintif tidak mengemukakan otoriti undang-undang kes bahawa di bawah undang-undang biasa, terdapat kausa tindakan 'campur tangan tak sah ke atas tanah'; dan (e) plaintif tidak mengemukakan keterangan bahawa: (i) defendan pertama dan kedua telah campur tangan dengan hak plaintif ke atas rumah tersebut; (ii) defendan pertama dan kedua menggunakan cara yang tidak sah; (iii) defendan pertama dan kedua mempunyai niat untuk mencederakan plaintif; dan (iv) bahawa plaintif sebenarnya telah cedera. Berdasarkan dapatan-dapatan di atas, mahkamah membuat kesimpulan bahawa kausa tindakan plaintif untuk 'campur tangan tak sah ke atas tanah' adalah salah faham dan tersasar (lihat perenggan 151–156 & 160).

(12) Citibank, sebagai pemegang gadaian, adalah 'pembeli' dalam takrifan 'pembeli' di bawah s 5 KTN, memandangkan Citibank memperoleh kepentingan dalam rumah tersebut. Dalam kes ini, tiada keterangan yang menafikan fakta bahawa Citibank memperoleh cagaran tersebut dengan

suci hati dan untuk balasan bernilai. Dalam kes ini, di samping mengakui bahawa Citibank tidak melakukan detinu, pencerobohan harta dan campur tangan tak sah terhadap rumah tersebut, plaintif juga telah mengakui dalam pemeriksaan balas bahawa: (a) Citibank tidak mengetahui tentang apa-apa perjanjian atau pertikaian antara plaintif dan defendan pertama; dan (b) amaun tertunggak yang perlu dibayar di bawah pinjaman defendan pertama mesti dijelaskan terlebih dahulu (supaya gadaian boleh dilepaskan) sebelum apa-apa pemindahan rumah selanjutnya boleh dilakukan. Mahkamah juga telah mempertimbangkan keterangan plaintif terhadap dokumen kontemporari seperti carian hakmilik, notis untuk menarik balik kaveat persendirian (Borang 19G), dan gadaian (Borang 16A). Otoriti undang-undang kes membimbing mahkamah dan mengikat mahkamah untuk memilih dokumen kontemporari berbanding keterangan lisan plaintif. Berdasarkan dapatan-dapatan di atas, mahkamah memutuskan bahawa Citibank adalah pembeli (pemegang gadaian) dengan suci hati dan untuk balasan bernilai rumah tersebut dan seterusnya memperoleh kepentingan yang tidak boleh disangkal ke atas rumah tersebut menurut s 340(3) KTN (lihat perenggan 167, 169, 171 & 175–178).]

Cases referred to

Chong Keow v Shaari Yaacob [1988] 1 CLJ 325; [1987] 1 MLRH 434, HC (folld)

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465; [2014] 4 AMR 301; [2014] 6 CLJ 269; [2014] 4 MLRA 397, FC (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35; [1987] 1 MLRA 665, SC (refd)

Foo Sam Ming v Archi Environ Partnership [2004] 1 MLJ 449; [2004] 2 AMR 241; [2004] 1 CLJ 759; [2001] 1 MLRA 55, CA (folld)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

ING Insurance Bhd v Rathinasamy a/l Kasinathan [2018] 2 MLJ 369; [2018] 5 AMR 629; [2018] 10 CLJ 488; [2017] 4 MLRA 501, CA (folld)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885; [2016] 1 MLRA 647, FC (refd)

Joseph Paulus Lantip v Tnio Chee Chang and another appeal [2020] 5 MLJ 708; [2020] 4 CLJ 79; [2020] AMEJ 0010; [2020] 2 SSLR 469, CA (folld)

Leo Pharmaceutical Products Ltd A/S (Lovens kemiske Fabrik Produktionsaktieselskab) v Kotra Pharma (M) Sdn Bhd [2009] 5 MLJ 703; [2009] 5 AMR 132; [2012] 10 CLJ 507; [2009] 13 MLRH 385, HC (refd)

MBf Finance Bhd v Global Pacific Textile Industries Sdn Bhd & Anor [1993] MLJU 432; [1994] 2 AMR 1084; [1993] 4 CLJ 379; [1993] 2 MLRH 728, HC (folld)

Mohd Mopti bin Yassin v Lembaga Kemajuan Perusahaan Pertanian Negeri Pahang (LKPP) Corp Sdn Bhd & Anor [2012] 1 MLJ 103; [2011] 5 MLRH 715; [2011] 1 LNS 493, HC (refd)

Noorianti bte Zainol Abidin & Ors v Tang Lei Nge [1990] 2 MLJ 242; [1990] 1 CLJ 943; [1989] 2 MLRH 666, HC (refd)

RHB Bank Bhd v Singlefine (M) Sdn Bhd & Ors [2019] 11 MLJ 333; [2019] 4 AMR 48; [2020] 1 CLJ 721; [2019] 4 MLRH 299, HC (folld)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 5 AMR 497; [2015] 7 CLJ 584; [2015] 5 MLRA 191, FC (refd)

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265; [1996] 2 AMR 2633; [1997] 2 CLJ 607; [1996] 2 MLRA 563, CA (refd)

Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd [2006] 6 MLJ 24; [2006] 8 CLJ 657; [2006] 3 MLRH 443, HC (refd)

Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799; [2014] 1 AMR 418; [2014] 2 CLJ 445; [2012] 2 MLRA 766, FC (refd)

Legislation referred to

Contracts Act 1950 ss 15, 16, 16(2)
Evidence Act 1950 ss 101, 103
National Land Code ss 5, 89, 340, 340(1), (3), (3)(b), Forms 16A, 19G
Penal Code

RSN Rayer (with Meharaj a/l Selvarajoo) (R Nethaji Rayer & Co) for the plaintiff.
Mohammad Irwan Shah bin Md Asri (Aswandi Hashim & Co) for the first defendant.
Sathya Kumardas (with Pauline Koh) (Shearn Delamore & Co) for the second defendant.

Kenneth St James JC:

PRELUSION

[1] An older man. A younger woman. A marriage. A house. A transfer of the house to the wife. A loan from the bank. A charge over the house to the bank. A divorce.

[2] The husband wants the house back.

[3] The husband sues the now-ex-wife and the bank, for the return of the house, for various declarations and for damages.

[4] Should the ex-wife and the bank be ordered to return the house to the husband? A

THE PERTINENT PLEADED FACTS — THE PLAINTIFF'S CLAIM

[5] It is expedient to set out the very words and expressions used in the pleadings. The words placed within inverted commas are words either pleaded by the plaintiff in his statement of claim, or pleaded by the first defendant in her defence. B

[6] The plaintiff ('Ibrahim') pleads these material facts. C

[7] In 1999 (18 years before this suit was filed in 2017), the first defendant ('Devi') offered to take care of Ibrahim as his caregiver. Soon after this caregiving relationship started, Devi influenced Ibrahim to marry her. D

[8] Devi spoke words of love and affection to Ibrahim. The expressions of love included:

(a) 'my heart has an instinct to love abang'; E

(b) 'one's age and appearance is not a barrier in love'; and

(c) 'I will still love abang even though you are old'.

[9] Devi made promises to Ibrahim that included: F

(a) the promise to be his wife and 'remain his wife' until his demise;

(b) the promise not to leave him;

(c) the promise to take care of him 'permanently', until his demise; and G

(d) the promise to continue to give him her 'undivided love'.

[10] Devi influenced Ibrahim with these promises. And Ibrahim believed her. H

[11] Ibrahim 'informed' Devi, and Devi 'agreed' that if she breaches her promises:

(a) Ibrahim would be entitled to divorce her; I

(b) she would not be entitled to claim maintenance from him;

(c) she would not be entitled to claim 'any property or division of property' from the marriage; and

A (d) Ibrahim would be entitled to 'claim and recover' any property 'which he had transferred' to Devi.

[12] These matters between Ibrahim and Devi constituted the contract between them.

B

[13] They were married in September 2000.

[14] At the time when they were married, Ibrahim owned two properties:

C (a) a house at No 6, Jalan Sungai Ara 4, Taman Sungai Ara, 11900 Bayan Lepas, Pulau Pinang ('house'). He bought the house years ago in 1985; and

(b) a shophouse at No 96, Jalan Mayang Pasir, Bayan Baru, 11950 Pulau Pinang ('shophouse').

D

[15] Ibrahim 'did not intend to transfer' and was 'very reluctant to transfer' the house to Devi. But Devi 'influenced' and 'manipulated' Ibrahim to transfer the house to her. This occurred in 2005.

E

[16] Devi used '*undue influence* and control over' Ibrahim. Devi 'forced and induced' Ibrahim to transfer the house to her. Devi '*dominated*' Ibrahim and 'influenced' him through '*manipulation* and *coercion*' (Ibrahim provided some particulars of undue influence and coercion).

F

[17] After Ibrahim transferred the house to Devi, she breached her promises to Ibrahim. The breaches of promise include the following acts:

(a) Devi lied to Ibrahim;

G (b) Devi committed adultery with an Iranian man;

(c) Devi left Ibrahim;

(d) Devi 'abandoned the marriage'; and

H (e) Devi failed to care for Ibrahim 'permanently', 'until the end of his life'.

[18] In 2005, Devi, 'fraudulently' and 'without (Ibrahim's) knowledge or consent' charged the house to the second defendant ('Citibank') as security for a RM1.287m loan. Devi was obligated to repay the loan in monthly I instalments of RM6,700 for the 'mortgage' entered by Citibank over the house. This amounted to an '*unlawful detention*' of his house.

[19] Devi and Citibank 'gained control' of the house and 'dealt with' the house 'inconsistently' with Ibrahim's rights as the beneficial owner of the

house. Devi and Citibank 'made' and took the house as collateral for the loan, in breach of Ibrahim's rights as the beneficial owner. A

[20] Citibank accepted the house as security for the loan even though Devi had 'no absolute title' over the house, and even though Devi had a 'defective title' over the house. B

[21] Devi had 'interfered with' Ibrahim's house, 'with the intention of asserting some rights or dominion over' the house in a 'manner inconsistent with' Ibrahim's rights as the 'true owner'. C

[22] Devi and Citibank committed the tort of *conversion*, by doing these acts:

(a) 'acted improperly in the acquisition and management of the house, in breach of Ibrahim's rights as the true owner'; D

(b) 'wrongfully detained' the house; and

(c) 'misused and wrongfully dealt with' the house.

E

[23] Devi and Citibank committed the tort of *detinue*, by doing these acts:

(a) 'wrongfully detained' the house 'through the entry of the mortgage'; and

(b) despite Ibrahim's demand, Devi and Citibank did not 'release the charge and return' the house to Ibrahim, free of any encumbrance. F

[24] Devi and Citibank committed the tort of *trespass to property* by doing this act — 'wrongfully charged' the house and 'entered into a wrongful mortgage' on the house, without Ibrahim's permission as the beneficial owner. G

[25] Devi and Citibank committed the tort of *unlawful interference* with property by doing the same act — 'wrongfully charged' the house and 'entered into a wrongful mortgage' on the house, without Ibrahim's permission as the beneficial owner. H

[26] The 'mortgage' given by Devi to Citibank is 'invalid, void and cannot be enforced'.

[27] When Devi defaulted from paying the monthly repayment instalments, Ibrahim stepped in and paid the monthly instalments since March 2018, to prevent foreclosure of the house. I

IBRAHIM'S MULTIPLE CAUSES OF ACTION

[28] Ibrahim pleaded these 'causes of action' against Devi:

(a) breach of contract;

(b) undue influence;

(c) manipulation;

(d) coercion;

(e) domination;

(f) conversion;

(g) detinue;

(h) trespass to property; and

(i) unlawful interference with property.

[29] Ibrahim pleaded these causes of action against Citibank:

(a) conversion;

(b) detinue;

(c) trespass; and

(d) unlawful interference with property.

THE RELIEFS AND REMEDIES PRAYED FOR BY IBRAHIM

[30] Ibrahim prays for a number of declarations. He seeks reliefs and remedies that include:

(a) a declaration that Ibrahim is the registered and beneficial owner of the house;

(b) a declaration that Devi is a bare trustee of the house;

(c) a declaration that Ibrahim's transfer of the house to Devi is 'void, invalid and does not have any legal effect';

(d) Devi is to return to Ibrahim the original title of the house;

(e) an order that the registrar of land titles 'cancel or expunge' Devi's name from the title, and 'restore or reinstate' Ibrahim's name as the registered owner of the house;

(f) an injunction that prohibits Devi from 'harassing' Ibrahim while he still lives in the house;

(g) an injunction that prohibits Devi from entering the house;

(h) an injunction that prohibits Devi from entering the shophouse;

(i) an order that revokes Devi's Malaysian citizenship;

(j) damages from Devi and Citibank for the current market value of the house, for committing the torts of conversion and trespass;

(k) the 'return' of the house to Ibrahim within 14 days, failing which Devi and Citibank are to pay Ibrahim compensation that includes the current market price; and

(l) general, aggravated and exemplary damages.

DEVI'S DEFENCE

[31] Devi puts Ibrahim to strict proof of his causes of action against her. She pleads these material facts.

[32] Devi never made the promises that Ibrahim asserts. For instance, Devi never offered to 'take care of' Ibrahim, nor to be his 'caregiver'; Devi never influenced Ibrahim nor asked Ibrahim to marry her.

[33] Ibrahim had a friendship with Devi's 'adoptive father'. Ibrahim submitted a 'proposal' to marry Devi through Devi's adoptive father. Devi married Ibrahim (on 20 September 2000) because she wanted to 'respect' the 'decision that had already been made by Devi's adoptive father'. Devi had no choice but to marry Ibrahim. She was 'forced' to marry him.

[34] Devi denies the allegation that she made promises to Ibrahim, to induce him to marry her. She asserts that this allegation is 'unfounded, false and made in bad faith'.

[35] Devi asserts that there was no agreement, whether in writing or verbally, between Devi and Ibrahim.

[36] Any alleged breach of promise relating to the marriage by Devi must be proven at the Syariah Court and not in the civil courts.

[37] Ibrahim transferred the house to Devi 'legally, willingly and without coercion', after 'almost five years of marriage'. The house was registered in Devi's name on 29 August 2005.

[38] On the same date (29 August 2005), the house was charged to HSBC Bank Malaysia Bhd ('HSBC Bank') to procure a loan, at Ibrahim's 'request, appeal and application'.

[39] Devi asserts that the monies borrowed were used to settle Ibrahim's personal debts and his companies' debts. The monies were also used as 'paid-up capital' in Ibrahim's company: Ibrahim Hashim Sdn Bhd ('company'), which was at the time 'unstable'.

[40] Devi was responsible to meet the monthly repayments for the loan related to the house. The house was later refinanced by Citibank, to enable Devi to reduce the monthly repayment amount that she had to bear. This was done with Ibrahim's knowledge. In any event, Devi, as the registered owner of the house, had every right to obtain refinancing and to charge the house to Citibank.

[41] Devi denies Ibrahim's allegation of trespass upon the house because she is the owner of the house. Instead, it was Ibrahim who trespassed upon the house, as he stayed in the house without Devi's permission.

[42] Devi became the majority shareholder of the company and was the executive director of the company until her position was 'wrongfully terminated' by the other shareholders of the company.

[43] Devi alone managed the company from 29 November 2011–30 October 2017 (for six years), without Ibrahim's involvement.

[44] Ibrahim no longer owned shares in the company because, on 29 November 2011, he transferred his shares to Devi, again 'willingly and without coercion'. This was done so that Devi would agree to be reappointed as the executive director of the company.

[45] Ibrahim also transferred the shophouse to Devi 'willingly and without coercion'. This was done on 24 April 2014.

CITIBANK'S DEFENCE

[46] Citibank granted Devi a RM1.287m loan, to refinance the house. Citibank redeemed the house from HSBC Bank, and registered a charge in Citibank's favour as security for the loan.

[47] Citibank is the registered chargee over the house in good faith and for valuable consideration, without any knowledge of Ibrahim's purported beneficial interest.

[48] Citibank is a 'subsequent bona fide purchaser for value' within the meaning of s 340(3)(b) of the National Land Code.

[49] The creation of the charge in Citibank's favour was 'separate and independent' of Ibrahim's transfer of the house to Devi.

[50] Ibrahim's allegations of undue influence, domination, manipulation and coercion concerning Ibrahim's transfer of the house to Devi, do not bear upon Citibank's rights as the registered chargee over the house.

[51] Ibrahim's causes of action against Citibank for the torts of conversion, detinue, trespass to property, and unlawful interference are 'unsustainable'.

THE AGREED ISSUES TO BE TRIED

[52] The parties agreed to go to trial for these three common issues to be tried:

(a) whether Devi breached the promises made to Ibrahim to marry, stay loyal to and take care of Ibrahim until the end of his life;

(b) whether Devi used undue influence, manipulated, coerced or dominated Ibrahim to transfer the house to Devi. If yes, then whether Ibrahim is entitled to the declarations and orders prayed for in Ibrahim's re-amended statement of claim; and

(c) whether Citibank is the 'subsequent purchaser' of the house and has therefore acquired an indefeasible interest in the house under sub-s 340(3) of the National Land Code, notwithstanding the alleged undue influence, manipulation, coercion or domination by Devi on Ibrahim in relation to the house.

FUNDAMENTAL PRINCIPLES ARE PIVOTAL IN THIS SUIT

[53] I find that to render a judgment in this case, it is pertinent and pivotal to be guided by fundamental principles, such as the following principles.

[54] First, the parties are bound by their pleadings.

[55] Second, the person who wants judgment based on the existence of certain facts, must prove those facts — s 101 of the Evidence Act 1950 ('the EA

1950'). The pertinent portions of s 101 are set out below:

> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) *When a person is bound to prove the existence of any fact*, it is said that *the burden of proof lies on that person*.
>
> ILLUSTRATIONS
>
> (a) ...
>
> (b) *A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true*.
>
> *A must prove the existence of those facts*. (Emphasis added.)

[56] Also, the person who asserts a particular fact, must prove that fact — s 103 of the EA 1950. The pertinent portions of s 103 are set out below:

> Section 103 Burden of proof as to particular fact
>
> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence*, unless it is provided by any law that the proof of that fact shall lie on any particular person. (Emphasis added.)

[57] Third, the plaintiff must prove the causes of action that he launches against the defendant. To prove each cause of action, the plaintiff must prove the elements of that cause of action.

[58] Ibrahim's multiple causes of action against Devi are — breach of the marriage contract, 'undue influence', coercion, conversion, detinue, trespass to property, and unlawful interference.

[59] Ibrahim's causes of action against Citibank are — conversion, detinue, trespass to property, and unlawful interference.

[60] Fourth, in a civil case, the burden of proof is on the balance of probabilities, which means that on the available evidence, it is 'more likely than not' that that fact in question occurred: *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 5 AMR 497; [2015] 7 CLJ 584; [2015] 5 MLRA 191 (FC).

[61] In *Sinnaiyah & Sons*, the Federal Court propounded:

> [39] It is worthy to note that the English Supreme Court in the case of *In re S-B (Children) (non-accidental injury)* [2009] UKSC 17 followed the law as pronounced in *In re B (Children)*. *The Supreme Court firmly approved that 'there is*

only one civil standard of proof and that is proof that the fact in issue more probably occurred than not' ...

[40] The Canadian courts took the same position as the English courts. In *FH v McDougall* [2008] SCC 53) *the Canadian Supreme Court held that* 'in civil cases there is only one standard of proof and that is proof on a balance of probabilities. *In all civil cases, the trial judge must scrutinise the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred'*. (Emphasis added.)

[62] The Federal Court in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885; [2016] 1 MLRA 647 (FC), puts it this way:

[13] The standard of proof in civil cases is the legal standard to which a party is required to prove its case, namely on a balance of probabilities. *In civil litigation, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not*. In the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Lord Denning said the following about the standard of proof in civil cases:

> *The ... [standard of proof] ... is well settled. It must carry a reasonable degree of probability ... if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.* (Emphasis added.)

FIRST ISSUE: DID DEVI BREACH THE ALLEGED PROMISES THAT SHE MADE, AND AGREED TO IBRAHIM'S CONDITIONS?

[63] Ibrahim asserts that Devi made promises to him that included these promises — the promise not to leave him, and the promise to take care of him until the end of his life. I will call these promises Devi's 'marital promises'.

[64] Ibrahim further asserts that he placed conditions on the marriage with Devi, that if she breaches her promises, then:

(a) Ibrahim would be entitled to divorce her;

(b) she would not be entitled to claim maintenance from him;

(c) she would not be entitled to claim 'any property or division of property' from the marriage; and

(d) Ibrahim would be entitled to 'claim and recover' any property 'which he had transferred' to Devi.

I will call these conditions Ibrahim's 'marital conditions'.

[65] Before going further, I would like to point out a distinction. This case is not a case of a promise of marriage or a promise to marry, leading to a breach of that promise. This is *not* one of those cases.

[66] In this case, Ibrahim and Devi got married. There was no breach of any promise to marry. They were already in a marriage.

[67] The dispute that arises in this case is that Ibrahim alleges that during the marriage, Devi entered into a contract with him. He alleges that the terms of the contract are his four marital conditions. He asserts that in this contract between them — and it bears repeating — if she leaves him (which means she breaches her marital promises), then Ibrahim can divorce her, without giving her any maintenance and property, and get the house back.

[68] So, the issues are:

(a) was there such a contract (with those conditions) between them?

(b) if there was, did Devi breach the contract? and

(c) if she did, was she obligated to transfer the house back to Ibrahim?

[69] About the burden of proving an assertion of fact, the principle is that he who asserts a fact must prove it, not she who denies it. The Federal Court in *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465; [2014] 4 AMR 301; [2014] 6 CLJ 269; [2014] 4 MLRA 397 (FC), propounded that:

> [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that *the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him (see s 103 of the Evidence Act 1950*). If he fails to prove both the liability and the quantum of damages, he loses the action. (Emphasis added.)

[70] Ibrahim has not submitted, to either guide me or bind me, any statute law or case law authorities that stand for the principle that marital promises, such as Devi's alleged *marital promises*, are enforceable.

[71] Ibrahim has the burden of proving, on the balance of probabilities, that Devi made those marital promises.

[72] I find that besides him merely saying so — in his pleadings and in his examination-in-chief (witness statement) — there is no evidence that proves, on the balance of probabilities, that Devi made the marital promises that Ibrahim insists that she had made. A

[73] Instead, Devi denies making any of those marital promises in her pleadings and in her testimony. B

[74] Ibrahim also has not submitted, to either guide me or bind me, any statute law or any case law authorities that conditions such as Ibrahim's *marital conditions*, which he placed on the marriage, are enforceable. C

[75] Ibrahim has the burden of proving, on the balance of probabilities, that he placed those marital conditions on their marriage and that Devi agreed to be bound by them. D

[76] Again, besides him merely saying so — in his pleadings and by his testimony — Ibrahim has produced no evidence that proves, on the balance of probabilities, that he placed those marital conditions on their marriage and that Devi agreed to be bound by them. E

[77] Instead, in Devi's pleadings and in her testimony, Devi denies that she made the alleged marital promises. She also denies that there were any of those marital conditions in their marriage. F

[78] So, there is diametrically conflicting evidence.

[79] Where there is diametrically conflicting evidence, I must consider which version is 'inherently probable or improbable' — *ING Insurance Bhd v Rathinasamy a/l Kasinathan* [2018] 2 MLJ 369; [2018] 5 AMR 629; [2018] 10 CLJ 488; [2017] 4 MLRA 501 (CA). G

[80] In *ING Insurance*, the Court of Appeal held:

> [63] Indeed, *when presented with two conflicting evidence by parties, it is incumbent upon the learned trial judge to undertake a critical evaluation of the sworn evidence which she had admitted including contemporaneous documentary evidence to see which version is inherently probable or improbable* ... (Emphasis added.) H

[81] I am also guided that where there is conflicting evidence, my primary evaluation is 'whose version is more inherently probable', and not merely who is more credible. In *Chong Keow v Shaari Yaacob* [1988] 1 CLJ 325; [1987] 1 MLRH 434 (HC), the High Court opined: I

> *I must not lose sight of the principle that in assessing the evidence of the parties in a suit,*

it is not merely a question of whom to believe but rather whose version is more inherently probable which is the prime consideration. (Emphasis added.)

[82] And in *Noorianti bte Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242; [1990] 1 CLJ 943; [1989] 2 MLRH 666 (HC), the same High Court held, at pp 243–244:

... *a trial judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable* — see for instance *Koay Teik Choo & Ors v R* [1956] MLJ 52 ... (Emphasis added.)

[83] Further, where there is conflicting evidence, I am to consider 'the overall probabilities' and take into account 'all the surrounding circumstances' to decide on the truth of an asserted fact.

[84] In *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; [1987] 1 MLRA 665 (SC), the Supreme Court enunciated:

We would respectfully agree with the soundness of the observation made in *Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1985] 1 Lloyd's Rep 1 which reads:

It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, *reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth*. (Emphasis added.)

[85] And in *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324 (CA), the Court of Appeal propounded:

In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also encumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact ... (Emphasis added.)

[86] I am of the view that it is inherently improbable that Devi made those marital promises, or that Ibrahim placed those marital conditions on their marriage and Devi agreed to them. My reasons include the following:

(a) both Ibrahim and Devi made reference to Devi's godfather. Ibrahim was introduced to Devi by Devi's 'ayah angkat'. Ibrahim wanted to marry Devi and informed Devi's godfather. Devi married him through the involvement of her godfather. In other words, it was likely that the marriage was *not* a love marriage; and

(b) in the context of Ibrahim's assertions and Devi's denial, I cannot imagine that — if Ibrahim had laid out his marital conditions, whether it was before the marriage or during the marriage — Devi would have positively agreed to his very specific marital conditions. If she had agreed, it would have been a substantial, if not complete, *waiver* of her rights as a wife. If she breached the alleged marital promises — he could just divorce her. If she breached the alleged marital promises — she would not be entitled to maintenance. If she breached the alleged marital promises — she would not be entitled to any property division. And if she breached the alleged marital promises — she would have to return every property that Ibrahim ever gave to her. I cannot imagine that a fiancé, before the marriage, or a spouse, during a marriage, would agree to such marital conditions.

[87] I therefore, on the balance of probabilities, find that it was more likely than not that Devi did not make the marital promises that Ibrahim pleaded that she had made.

[88] And I similarly find that if Ibrahim had placed the marital conditions on the marriage, it was not likely that Devi would have agreed to those marital conditions.

[89] Moving on to discuss contract law, I bear in mind that the principal elements of a contract are offer, acceptance, consideration and mutual intention to contract.

[90] If Ibrahim is submitting that there was a contract between Ibrahim and Devi, and that Devi breached the contract, obligating her to 'return' the house to him — I am of the view that there was, in fact, no contract formed between them. Ibrahim has not proven all the elements of a contract. He has not proven that there was an offer from him (containing the marital promises and the marital conditions that he asserts). He has not proven that Devi accepted his offer. And he has not proven that there was a mutual intention to enter into such a contract, particularly on the part of Devi.

SECOND ISSUE: DID DEVI COMMIT UNDUE INFLUENCE ON, MANIPULATED, COERCED OR DOMINATED IBRAHIM TO TRANSFER THE HOUSE TO HER?

Undue influence

[91] Section 16 of the Contracts Act 1950 ('the CA 1950') explains the circumstances that constitute undue influence. The pertinent portions of s 16 provide that:

Section 16 'Undue influence'

(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that *one of the parties is in a position to dominate the will of the other* and *uses that position to obtain an unfair advantage over the other*.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is *deemed* to be in a position to dominate the will of another —

(a) where he *holds a real or apparent authority* over the other, or where he *stands in a fiduciary relation* to the other; or

(b) where he *makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress*. (Emphasis added.)

[92] I am guided by the High Court case law authority of *RHB Bank Bhd v Singlefine (M) Sdn Bhd & Ors* [2019] 11 MLJ 333; [2019] 4 AMR 48; [2020] 1 CLJ 721; [2019] 4 MLRH 299 (HC), at para [37], where it was held that unless one of the presumptions in sub-s 16(2) applies, under case law:

three requirements must be fulfilled for undue influence to subsist:

(a) one of the parties must have been in a position to dominate the will of the other party;

(b) the party in the position to dominate the will of the other must have used that position to influence the other party; and

(c) the dominant party obtained an unfair advantage as a consequence.

[93] In our case, the presumptions in sub-s 16(2) do not apply. Ibrahim has not presented or produced, and I do not find, that — (i) Devi held 'a real or apparent authority' over Ibrahim or that she was Ibrahim's fiduciary; and (ii) there was no contract between Devi and Ibrahim, such that Ibrahim's 'mental capacity' is in question due to his age or illness or distress.

[94] So, to prove undue influence, Ibrahim has to prove the following three elements set out in case law:

(a) Devi was in the position to dominate Ibrahim's will;

(b) Devi used that dominant position to influence Ibrahim; and

(c) Devi obtained an unfair advantage over Ibrahim.

[95] Undue influence is described as an 'equitable doctrine' and a 'concept' by the Court of Appeal in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265; [1996] 2 AMR 2633; [1997] 2 CLJ 607; [1996] 2 MLRA 563 (CA).

[96] Undue influence is therefore not a cause of action per se. The doctrine of undue influence is ordinarily applied in contract law in the sense that undue influence can impair or taint the validity of a contract. A

[97] Ibrahim did not present, in his submissions (written and oral), and I *do not find*, any cogent evidence, that: B

(a) Devi dominated Ibrahim's will;

(b) Devi was in a dominant position to influence Ibrahim; and

(c) Devi had an unfair advantage over Ibrahim. C

[98] Ibrahim, presently 85 years old (when he testified at the trial in October 2022), is lucid, coherent, resolute (in filing this suit in 2017 and pursuing it to trial), and unwavering (in cross-examination). I am not at all inclined to find that Devi could have dominated his will and taken advantage of him. D

[99] Besides Ibrahim merely saying so in his statement of claim and witness statement, there is no evidence of undue influence on Devi's part. There is only Ibrahim's unsubstantiated assertion of undue influence. E

[100] Ibrahim asserts that he was influenced, dominated and manipulated into signing the transfer of the house to Devi. But I find that it is more likely than not that he transferred the house to Devi willingly. He testified, to the effect that: 'Mula2 dia baik, kemudian dia buat yang tak baik' — which demonstrated to me that he transferred the house to Devi willingly, but later found her to be undeserving because of what he alleged she did — leaving him to marry another man. F

[101] Dates are important here. From the common (agreed) chronology of facts, signed by all three parties, the parties agreed that these facts occurred: G

(a) in *2005*, Ibrahim transferred the house to Devi (when things were good between them). This was when he was 68 years old. I find that Ibrahim must have been lucid then, because he remained lucid when he testified in the trial in 2022, when he was 85 years old; H

(b) in *2011*, Ibrahim lodged a private caveat over the house; and

(c) but in *2014*, Ibrahim withdrew the private caveat, so that Devi could get a loan of RM1.287m from Citibank to refinance the house. Out of this RM1.287m loan, the sum of about RM716,000 was disbursed to HSBC Bank to redeem the earlier loan and discharge the previous charge that HSBC Bank had over the house. The balance sum of about RM571,000 was disbursed to Devi (in this regard, Devi testified that this money was used by the both of them, and also used to pay off I

Ibrahim's company's debts. Ibrahim, of course, denies this fact).

[102] Another cogent fact that came out was this — he did not file this suit until September *2017* — three years after the divorce.

[103] If there were in fact those marital promises and marital conditions that Ibrahim alleges — for instance, that Devi promised to care for him until he dies — then when things went bad between them (between 2005 and 2014), he could have filed action to get the house back. Or at least, after 2014, when they were formally divorced, he could have filed suit. But he did not. This goes to demonstrate that the transfer of the house to Devi in 2005 was genuine.

[104] But after they were divorced, Ibrahim felt scorned, and wanted to get the house back because he then no longer wanted her to have the house.

[105] On a different note, for the house to be validly transferred to Devi in 2005, Ibrahim must have signed the necessary instrument of transfer: the memorandum of transfer ('MOT'). The MOT must have been registered, giving Devi an indefeasible title to the house: s 340(1) of the National Land Code ('the NLC').

[106] Subsection 340(1) of the NLC is set out here:

> Section 340 Registration to confer indefeasible title or interest, except in certain circumstances.
>
> *The title or interest of any person* or body for the time being *registered as proprietor of any land*, or in whose name any lease, charge or easement is for the time being registered, *shall*, subject to the following provisions of this section, *be indefeasible*. (Emphasis added.)

[107] I am compelled to find, on the balance of probabilities, that Ibrahim has not proved that Devi committed undue influence upon him, which caused him to transfer the house to her way back in 2005.

Manipulation

[108] To manipulate someone is to influence or control someone, usually into doing something. Here, Ibrahim asserts that Devi manipulated him into transferring the house to her.

[109] Ibrahim did not present, and I do not find, any cogent evidence that Devi manipulated Ibrahim into transferring the house to her.

[110] On the contrary, the agreed (undisputed) facts, which are supported by the contemporaneous documents — particularly Ibrahim's transfer of the house to Devi and Ibrahim's facilitation of the refinancing of the house from HSBC Bank to Citibank — demonstrate that the transfer of the house to Devi and the refinancing of the house were not tainted by the alleged manipulation that Ibrahim alleges; that these acts were done willingly.

[111] I thus find, on the balance of probabilities, that Ibrahim has not proved that Devi manipulated him into transferring the house to her in 2005.

Domination

[112] To dominate someone is to have power or control over someone; to be able to direct or command someone; to rule over someone. Here, Ibrahim asserts that Devi dominated him into transferring the house to her.

[113] Similar to the assertion of manipulation, Ibrahim did not present, and I do not find, any cogent evidence that Devi dominated Ibrahim into transferring the house to her.

[114] I hence find, on the balance of probabilities, that Ibrahim has not proved that Devi dominated him into transferring the house to her all those years ago.

Coercion

[115] Coercion is defined in the CA 1950. The pertinent portion of s 15 of the CA 1950 is set out here:

> 'Coercion' is the *committing, or threatening to commit any act forbidden by the Penal Code*, or the *unlawful detaining or threatening to detain, any property, to the prejudice of any person* whatever, with the intention of causing any person to enter into an agreement. (Emphasis added.)

[116] The two elements of coercion under s 15 of the CA 1950 are:

(a) doing or threatening to do an act that is prohibited by the Penal Code; or

(b) unlawfully detaining, or threatening to detain, a property to someone's prejudice.

[117] There was no evidence of a threat to perform a criminal act. And there was no evidence of Devi unlawfully 'detaining' the house to Ibrahim's prejudice.

[118] Again, the same as for the assertions of manipulation and domination, Ibrahim did not present, and I do not find, any cogent evidence that Devi coerced Ibrahim into transferring the house to her.

[119] And so I find, on the balance of probabilities, that Ibrahim has not proved that Devi coerced him into transferring the house to her 17 years ago in 2005.

SECONDARY ISSUE THAT RELATES TO IBRAHIM'S CAUSES OF ACTION — DID DEVI OR CITIBANK COMMIT CONVERSION, DETINUE, TRESPASS TO PROPERTY AND UNLAWFUL INTERFERENCE AGAINST IBRAHIM?

Conversion

[120] Conversion is when someone takes *goods* or *chattels* belonging to someone else and deals with them as if the goods or chattels were her own.

[121] In our case, the subject matter is the house. Ibrahim did not submit on the law as to whether conversion applies to real property, such as the house. I am not referred to any case law authority that propounds the principle that the tort of conversion applies to *real property*.

[122] From case law and other authorities, I am of the view that conversion does not apply to real property, namely, the house. The tort of conversion, therefore, relates only to goods and chattels, and not real property (land).

[123] I am guided by the case law authority of *Joseph Paulus Lantip v Tnio Chee Chang and another appeal* [2020] 5 MLJ 708; [2020] 4 CLJ 79; [2020] AMEJ 0010; [2020] 2 SSLR 469 (CA), where the Court of Appeal discusses the tort of conversion. The Court of Appeal had this to say about conversion:

> [41] ... In a claim for conversion, it is the *goods* which are alleged to have been misappropriated and the burden of proof is upon the plaintiff to prove that the defendants have dealt with *goods* belonging to him, either without his authorisation or consent.
>
> [42] The Court of Appeal decision in *OSK Trustees Bhd (as trustees for Sunway Real Estate Investment Trust) & Anor v Metroplex Holdings Sdn Bhd* [2020] 3 MLJ 358; [2019] 10 CLJ 1 discussed in some details on the law of conversion; see paras 27–44 of the judgment. Conversion is a tort committed by a person who deals with *chattels* not belonging to him and that dealing is in a manner that is inconsistent with the rights of the owner (para 27). It is also conversion when one deals with *goods* belonging to someone else such as to usurp that someone of his proprietary or possessory rights in the goods, however mistakenly or innocent that dealing might have been — see Federal Court in *Rimba Muda Timber Trading v Lim Kuoh Wee*

[2006] 4 MLJ 505 (para 28). Conversion may also be committed by the wrongful misappropriation of another's *chattels*, where the other person is deprived of the use and possession of the chattel (para 29); or when there is a lack of mandate or authorisation before the *goods* of another are taken, detained, sold or dealt with in such manner as to usurp the rights, title, ownership or possession of the other (para 30).

[124] I am reinforced in this view by these further authorities such as *MBf Finance Bhd v Global Pacific Textile Industries Sdn Bhd & Anor* [1993] MLJU 432; [1994] 2 AMR 1084; [1993] 4 CLJ 379; [1993] 2 MLRH 728 (HC), where the High Court held that, in law, there is a distinction between chattel and land as defined under the NLC.

[125] Section 5 of the NLC provides that 'land' includes:

(d) all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface.

[126] The High Court in *MBf Finance* held (at AMR pp 1091 and 1100–1101) that the dyeing machines installed in the factory are chattels and not fixtures (which are land). The High Court held that the dyeing machines were installed temporarily and were capable of being removed, making them chattels, and not land.

[127] The point is that as chattels are distinct from land, the tort of conversion applies to goods and chattels, and not to the house.

[128] In any event, Ibrahim asserts that Devi and Citibank committed the tort of conversion by dealing with the house (charging the house to Citibank) in 2014. But the contemporaneous documentary evidence proves that:

(a) the house was transferred by Ibrahim to Devi in August 2005;

(b) Ibrahim withdrew his private caveat over the house in April 2014 (which meant that Ibrahim no longer asserted any rights to the house). By withdrawing his private caveat, he enabled, rather than stopped, the transfer of the house to Devi and the registration of the charge to Citibank; and

(c) Devi, as the owner, charged the house to Citibank in May 2014.

[129] And s 89 of the NLC provides that the register document of title is conclusive evidence that Devi owns the house.

[130] Nevertheless, leaving aside for the moment the distinction about whether conversion applies only to goods and chattels and not to real property. Like any cause of action, conversion has its elements or ingredients.

[131] The elements that Ibrahim has to prove for his cause of action for conversion against Devi and Citibank are that:

(a) Devi's and Citibank's conduct in relation to the house was 'inconsistent with' Ibrahim's rights as the alleged owner of the house;

(b) Devi's and Citibank's conduct of 'misappropriating' the house was 'deliberate', and 'not accidental'; and

(c) Devi's and Citibank's conduct was so extensive an 'encroachment' onto Ibrahim's rights as the owner as 'to exclude him from the use and possession' of the house.

[132] These elements of conversion were propounded by the Federal Court in *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799; [2014] 1 AMR 418; [2014] 2 CLJ 445; [2012] 2 MLRA 766 (FC). The Federal Court held:

> [51] In *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 WLR 1353 at p 1366, Lord Nicholls established these propositions.
>
> > 39 ... Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, *the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner* (or other person entitled to possession). *Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods* ...
> >
> > 40 The judicially approved description of the tort in Clerk & Lindsell encapsulates, in different language, these basic ingredients ... (Emphasis added.)

[133] I find that Ibrahim has produced, not only insufficient evidence, but no evidence to prove the elements of conversion. There is no evidence to prove that Devi's conduct was inconsistent with Ibrahim's rights over the house. Ibrahim signed all the legal instruments necessary to transfer the house to Devi in 2005.

[134] There is no evidence to prove that Devi and Citibank misappropriated the house from Ibrahim. I reiterate — Ibrahim transferred the ownership of the house to Devi.

[135] And there is no evidence that Devi and Citibank encroached onto Ibrahim's rights as the owner of the house. He had already divested his rights over the house to Devi many years before the dispute arose between them.

[136] Ibrahim has failed to prove the elements required to succeed in his cause for conversion.

Detinue

[137] Detinue is the tort where someone wrongfully detains someone else's goods or chattels. Like conversion, I am of the view that detinue does not apply to real property.

[138] The elements for the tort of detinue are well set out in the High Court case of *Mohd Mopti bin Yassin v Lembaga Kemajuan Perusahaan Pertanian Negeri Pahang (LKPP) Corp Sdn Bhd & Anor* [2012] 1 MLJ 103; [2011] 5 MLRH 715; [2011] 1 LNS 493 (HC), where it was held:

> [37] In bringing this action the plaintiff had relied upon the law of detinue. The tort of detinue as described in one text book describes detinue as involving *wrongful detention of goods* by the defendant and this covers two circumstances; first where he is in possession of such goods and loses them and secondly, the refusal without justification to deliver the goods to the person so entitled (*Principles of the Law of Torts in Malaysia* by Wan Azlan Ahmad and Mohsin Hingun, Malayan Law Journal, 1998 Ed). (Emphasis added.)

[139] Again, leaving aside the issue of whether detinue applies to the house, there is just no evidence to demonstrate that Devi wrongfully detained the house from Ibrahim.

[140] Most significantly, it was Ibrahim's own testimony that extinguished his cause of action for detinue against Devi and Citibank. In cross-examination, he was asked: 'Bukannya Bank yang menahan secara salah, pihak Bank ada beri pinjamin, setuju kan Tuan Haji?'. He answered: 'Setuju'.

[141] I find that Ibrahim's causes of action for conversion and detinue are simply misconceived and misplaced, because these torts apply to goods and chattels, and not to land (the house).

[142] Further, Ibrahim's causes for conversion and detinue are plainly misaligned with the facts of the case. Devi has been the registered owner of the house since 2005. She was the owner of the house when the charge to Citibank was created in 2014. She did not deal with a piece of land that did not belong to her.

Trespass to property

[143] Ibrahim's cause of action for the trespass to property suffers the same fate.

[144] The elements for trespass to property are:

(a) entering into the land that belongs to another;

(b) continuing to remain on the land; and

(c) 'placing or projecting' an object on the land.

[145] These elements for trespass to property are borne out in the High Court case of *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24; [2006] 8 CLJ 657; [2006] 3 MLRH 443 (HC), where the court held:

> [10] The tort of trespass to land ... consists of three significant factors. *Firstly, it is the act of entering upon land in the possession of another ... Secondly*, having entered upon such land *the trespasser continues to remain on the land. Thirdly, the trespasser placing or projecting any object upon such land*. It must be emphasised that in each case, the entry is without lawful justification (*Barker v The Queen* (1983) 153 CLR 338, 356). (Emphasis added.)

[146] Ibrahim did not present, and I do not find, any cogent evidence that Devi entered the house when she had no right to, continued to remain in the house when she had no right to, and placed objects on or in the house when she had no right to. She is the rightful owner of the house at all material times.

[147] Here again, Ibrahim's testimony defeated his own cause of action for trespass to property against Devi and Citibank. He admitted (conceded) that there was no trespass to property committed against him. When he was re-examined by his own counsel, he was asked: 'Notis tuntutan Tuan Haji kata ada pencerobohan daripada pihak Bank, selepas itu rakan bijaksana saya soal tidak ada apa-apa pencerobohan yang dilakukan oleh pihak Bank terhadap hartanah, so Tuan Haji jawab setuju, jadi tiada ada pencerobohan. Ada pencerobohan atau tiada pencerobohan, dua jawapan yang berbeza boleh jelaskan kepada Mahkamah yang mulia ini kenapa ada dua jawapan?'. He answered: 'Tiada pencerobohan'.

[148] I hence find, on the balance of probabilities, that Ibrahim has not proved that Devi or Citibank trespassed onto the house.

[149] Instead, I find that Ibrahim's cause of action for trespass to land is also misconceived and unsustainable. It was bound to fail.

Unlawful interference

[150] The elements of the tort of unlawful interference with *trade or business* are set out in the High Court case of *Leo Pharmaceutical Products Ltd A/S (Lovens kemiske Fabrik Produktionsaktieselskab) v Kotra Pharma (M) Sdn Bhd* [2009] 5 MLJ 703; [2009] 5 AMR 132; [2012] 10 CLJ 507; [2009] 13 MLRH 385 (HC), where the court enunciated:

> [78] The defendant's counterclaim is also based on the tort of unlawful interference with the defendant's trade or business ...
>
> [80] Under this head of the defendant's counterclaim, I am of the view that the burden is on the defendant to establish that:
>
> (a) the plaintiff has *interfered with the defendant's trade or business*;
>
> (b) the plaintiff has *used unlawful means*;
>
> (c) the plaintiff's *intention* was *to injure the defendant*; and
>
> (d) the defendant has *actually* been *injured* by the plaintiff.
>
> (See *H & R Johnson (Malaysia) Bhd v H & R Johnson Tiles Limited & Anor* [1995] MLJU 54; [1995] 2 CLJ 581 at p 591 per Zakaria Yatim J (later FCJ)). (Emphasis added.)

[151] I find that Ibrahim has not satisfied the elements of the cause of action of unlawful interference with trade or business. My reasons are as follows.

[152] First, Ibrahim did not plead the material facts that satisfy these elements of the cause of action of unlawful interference with trade or business.

[153] Second, this cause of action is incongruous (out of place) with the facts of our case. For instance, no trade or business is said to have been unlawfully interfered with.

[154] Third, Ibrahim did not plead the tort of nuisance, which can be described as interference with someone's use or enjoyment of land. Instead, Ibrahim pleads 'unlawful interference on the property' ie the house. The tort of nuisance is different to the tort of unlawful interference with trade or business.

[155] Fourth, Ibrahim did not submit (in his written and oral submissions) case law authority that under the common law, there is such a cause of action of 'unlawful interference on land'.

[156] Fifth, even if I were to consider whether Devi and Citibank unlawfully interfered with the house, then I find that Ibrahim has not proffered evidence that Devi and Citibank:

A (a) interfered with Ibrahim's rights over the house (as the house was no longer owned by him after he transferred it to Devi);

(b) using unlawful means;

(c) with the intention to injure Ibrahim; and

B (d) that Ibrahim was actually injured.

[157] The charge over the house that Devi created in favour of Citibank was not made by unlawful means. There is no evidence of the use of any unlawful C means.

[158] There is no evidence of Devi's and Citibank's intention to injure Ibrahim by the creation of the charge over the house.

D **[159]** There is also no evidence that Ibrahim was actually injured by the creation of the charge, as he was not the owner of the house when the charge was created.

E **[160]** This then compels me to similarly conclude that Ibrahim's cause of action for 'unlawful interference on land' is misconceived and misplaced.

[161] And most importantly, as it is with the causes of action for detinue and trespass to property, Ibrahim's own testimony put paid to his cause for unlawful F interference. In cross-examination, Ibrahim was asked: '... tindakan yang difailkan oleh Tuan Haji yang menyatakan Bank telah campur tangan dengan hak Tuan Haji sememangnya tidak benar. Setuju?'. He answered: 'Setuju'.

[162] I am thus compelled to find, on the balance of probabilities, that G Ibrahim has not proved that Devi or Citibank committed an unlawful interference with Ibrahim's trade or business, or with the house.

THIRD ISSUE: WHETHER CITIBANK IS A SUBSEQUENT PURCHASER OF THE HOUSE AND THEREFORE HAS ACQUIRED H INDEFEASIBLE INTEREST IN THE HOUSE UNDER SUB-S 340(3) OF THE NATIONAL LAND CODE, NOTWITHSTANDING THE ALLEGED UNDUE INFLUENCE, DOMINATION, MANIPULATION OR COERCION BY DEVI ON IBRAHIM

I **[163]** Devi, as the registered owner of the house, charged the house to Citibank, as security for the loan that she took. The legal instruments under the NLC and other necessary documents were executed and presented for registration. The charge was registered in Citibank's favour. The loan sum was released.

[164] Devi has been the registered owner of the house since 2005. She created the charge in 2014 (nine years later, which is long after the impugned transfer). A

[165] The matrimonial disputes between Ibrahim and Devi and the issues of their competing rights and obligations — are not only immaterial, but are extraneous, to Citibank's rights as the registered chargee over the house. B

[166] As alluded to earlier, it is my view that Ibrahim has not produced evidence to adequately prove his causes of action for conversion, detinue, trespass to property and unlawful interference against neither Devi nor Citibank. C

[167] Firstly — Citibank, as chargee, is a 'purchaser' within the definition of 'purchaser' under s 5 of the NLC, since Citibank has acquired an interest in the house. D

[168] The pertinent portion of s 5 is set out here:

> Section 5 Interpretation
>
> 'purchaser' means a person or body who in good faith and for valuable consideration *acquires* title to, or *any interest in land*; (Emphasis added.) E

[169] Secondly — I find that there is no evidence that dispels the fact that Citibank procured the charge in good faith and for valuable consideration. Citibank's interest in the house is indefeasible under s 340 of the NLC, particularly by sub-s 340(3). F

[170] The pertinent portions of s 340 are set out below for reference:

> Section 340 Registration to confer indefeasible title or interest, except in certain circumstances G
>
> (1) *The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any* lease, *charge* or easement is for the time being registered, *shall*, subject to the following provisions of this section, *be indefeasible*. H
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or I
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. (Emphasis added.)

[171] Thirdly — in addition to admitting that Citibank did not commit detinue, trespass to property and unlawful interference concerning the house, Ibrahim also admitted in cross-examination that:

(a) Citibank was not privy to any agreement nor, conversely, any dispute, between Ibrahim and Devi; and

(b) the outstanding amount due under Devi's loan must first be paid up (so that the charge can be discharged) before any further transfer of the house can take place.

[172] When Ibrahim was asked the question: 'Tuan Haji boleh setuju ... apa-apa persefahaman ataupun perjanjian yang dimasukki oleh Tuan Haji dan bekas isteri Tuan Haji, iaitu Defendan Pertama, pihak bank tidak tahu, setuju?', he answered: 'Setuju'.

[173] When he was asked: 'Setuju dengan saya ... kalau ada apa-apa pertikaian di antara kamu dan bekas isteri kamu, pihak Bank, pihak ketiga tidak akan tahu, setuju?', he answered: 'Setuju'.

[174] When Ibrahim was asked: 'Setuju ... hutang bank perlu diselesaikan sebelum apa-apa pindah milik berlaku?', he answered: 'Setuju'. And to the question: 'Setuju ... sehingga hari ini, hutang sepenuhnya dengan Citibank belum diselesaikan?', he answered: 'Setuju'.

[175] Fourthly, I must consider Ibrahim's oral testimony against the contemporaneous documents such as these documents — the title search (which discloses title particulars and dealings on the land), the notice of withdrawal of private caveat (Form 19G), and the charge (Form 16A).

[176] Case law authorities guide me and bind me to prefer the contemporaneous documents to Ibrahim's oral testimony — *Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449; [2004] 2 AMR 241; [2004]

1 CLJ 759; [2001] 1 MLRA 55 (CA), where the Court of Appeal held:

> 4 ... The learned judge approached the question of appointment by preferring the contemporaneous documents to the rather tenuous and tardy and unconvincing oral explanations given by the appellant on oath. This is how she put it:
>
> > Thus after scrutinising the oral evidence of the two main actors, namely PW1 and DW1. I am of the opinion that there are two conflicting versions as regards the alleged appointment of PW1. However when the two versions are compared with the documentary evidence and the conduct of the two parties, I find that PW1's version is more probable ...
>
> 5 Was she right in this approach? I think that she was. There are a number of authorities from which support may be drawn for such an approach that the trial judge here adopted. It is sufficient that I quote from two of them.
>
> 6 The first is *Tindok Besar Estates Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, where Chang Min Tat FCJ said (at p 234):
>
> > ... I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity*.
>
> 7 The second is *Grace Shipping Inc & Anor v CF Sharp & Co (Malaysia) Pte Ltd* [1987] 1 MLJ 257 (folld), where Lord Goff of Chieveley said (at p 265):
>
> > ... *it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities*. In this connection, Their Lordships wish to endorse a passage from a judgment of one of their number in *The Ocean Frost; Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1 when he said at p 57:
> >
> > > Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and *where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth*. (Emphasis added.)

[177] I therefore answer this third issue to be tried in the affirmative ie Citibank is a purchaser (chargee) of good faith and for valuable consideration of the house, and has consequently acquired an indefeasible interest in the house.

[178] I find that Ibrahim has failed to prove, on the balance of probabilities, his four causes of action against Citibank.

CONCLUSION

[179] In all the premises, I find that Ibrahim failed to prove the nine 'causes of action' he launched against Devi. I also find that Ibrahim failed to prove the four causes of action he mounted against Citibank.

[180] I dismiss Ibrahim/the plaintiff's claim — which consists of 17 prayers — with costs of RM50,000 each to be paid by Ibrahim/the plaintiff to Devi/the first defendant and Citibank/the second defendant by 19 June 2023. Costs are subject to the allocatur.

Plaintiff's claim against first and second defendants dismissed with costs of RM50,000 to be paid by plaintiff to each of defendants subject to allocatur.

Reported by Dzulqarnain Ab Fatar